

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSE L. LOPEZ

Claimant

VS.

NATIONAL BEEF PACKING CO., LP

Respondent

AND

ZURICH AMERICAN INSURANCE CO.

Insurance Carrier

Docket No. 1,034,854

ORDER

Claimant requests review of the March 10, 2008 preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

The Administrative Law Judge (ALJ) found that the claimant failed to prove that his injuries arose out of and in the course of his employment with respondent and denied claimant's request for medical treatment.

The claimant requests review of the ALJ's decision arguing that the evidence proved that he did sustain injury arising out of and in the course of his employment with the respondent. Therefore the Board should reverse the ALJ's preliminary hearing Order and find that he is entitled to medical treatment.

Respondent argues that the ALJ's decision should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The dispute between these litigants stems from claimant's allegation that he hurt his shoulders while at work on April 28, 2007. Respondent maintains that claimant did not hurt his shoulders at work but instead, hurt his shoulders while trimming trees or picking up limbs at his home on April 29, 2007. This allegation is based upon the testimony of Danny Briggs, the company physician's assistant, who says that claimant sought treatment on May 7, 2007 for his left shoulder complaints which he attributed to an accident on April 28, 2007.¹ But during this visit, claimant disclosed that he had been trimming trees the Sunday before and that he first noticed the pain on Tuesday, May 1, 2007.

Claimant says he told his supervisor of his injury on April 28, 2007 and that supervisor did not testify and deny this assertion. Claimant further says that his supervisor would not let him see the company's physician's assistant on that day. He finished out his shift and was off the next day. He was still noticing pain in his shoulder and took some over-the-counter pain medications. Then he went outside to rake leaves from 2 willow trees in his yard and while he admits to picking up a branch or two, and sustaining a cut from one of these branches, he adamantly denies trimming any trees. It is worth noting that the cut he sustained was still visible on May 7, 2007 when he sought treatment from Danny Briggs. In fact, the scar could be seen in August of 2007 when claimant's deposition was taken.

The following day, April 30, 2007, claimant failed to show up for work and did not call in. Claimant says this was due to pain in his shoulders, so much so that he could not so much as reach up to make a phone call. He also failed to go to work on Tuesday, May 1st and Wednesday May 2nd. On May 3, 2007, claimant testified that he called personnel and told them of his problem. He returned to work on May 4th but instead of working he went to see Danny Briggs, who was not there. Claimant was told to return on May 7th.

When Mr. Briggs saw claimant on May 7, 2007, he noticed the scratch on claimant's face and inquired as to the source. Mr. Briggs concluded, based upon claimant's time line, that his shoulder complaint, which during this time was limited to the left shoulder, was due to the tree trimming events and not to any work-related injury. No further treatment was offered or recommended based upon this belief.

The ALJ denied claimant's request for medical treatment without giving any reason, other than to say that claimant failed to meet his burden of establishing that he sustained an accident arising out of and in the course of his employment. It would appear that she concluded that claimant hurt his arm or arms while trimming trees or raking up leaves on April 29, 2007 rather than at work on April 28, 2007.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

¹ Briggs Depo., Ex. 1.

right depends.² “Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”³

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁴

The Board finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and his daughter in person and balanced that testimony against that of respondent’s witness, Danny Briggs, who testified by deposition. In denying claimant’s request for medical treatment the ALJ apparently believed Mr. Brigg’s testimony over the claimant’s testimony and that of his witness, his daughter.

This member of the Board concludes that some deference may be given to the ALJ’s findings and conclusions because she was able to judge the witnesses’ credibility by personally observing them testify. Moreover, this Board Member is unpersuaded by claimant’s argument that the language barrier must have contributed to Mr. Brigg’s confusion. While it is true that claimant speaks primarily Spanish, his version of the events strains credibility. If work did, indeed, cause his shoulders to be painful, as much as 8 out of 10 on the pain scale, it is difficult to see why he would go outside the very next day and rake leaves, much less trim trees or pick up branches. Claimant only denies that he was trimming trees, conceding that he picked up small branches and raked leaves. More problematic is the fact that he maintains his pain continued and yet he failed to seek treatment, call for help or contact his employer until May 3, 2007. In sum, this Board Member finds the ALJ’s preliminary hearing Order should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁵ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

² K.S.A. 2006 Supp. 44-501(a).

³ K.S.A. 2006 Supp. 44-508(g).

⁴ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

⁵ K.S.A. 44-534a.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated March 10, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2008.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge